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In the

Supreme Court of the United States

October Term, 1932.

No. [redacted]6 51

WILLIAM MILLER, Administrator of the estates of Marcus Andlauer and Ellanore Andlauer, deceased, *Petitioner,*

vs.

UNION PACIFIC RAILROAD COMPANY, a corporation, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE 8TH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

WILLIAM BUCHHOLZ and
MARTIN J. O'DONNELL,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE 8TH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

To the Honorable Supreme Court of the United States:

Your petitioner respectfully says:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Ellanore Andlauer, aged thirty-five, the mother of three children, and her husband, Marcus, while riding in the

family automobile, driven by the husband, an experienced driver, were killed on a much traveled public railroad crossing on December 11, 1927, at St. Marys, Kansas.

Petitioner is the administrator of the estates of Marcus Andlauer and his wife, Ellanore Andlauer. He instituted this action in a Missouri State court to recover for the wrongful death of the decedents, as authorized by Section 60-3203, R. S. Kansas 1923. The action was removed to the trial court by respondent on the ground of diversity of citizenship (Tr. 4-7). The cause was tried on an amended petition in two counts (Tr. 8-16) and answer (16-21) and reply (Tr. 21-22). Respondent operates a railroad westwardly through St. Marys, Kansas. St. Marys is an incorporated town of about twelve hundred inhabitants. St. Mary's College adjoins the town on the east. There is a student body at the college from five hundred to one thousand and a faculty of about one hundred, all of whom lived on the campus in dormitories. Exhibit 1 (Tr. 30) is a plat showing the location. The entrance to the college is marked by the regular railroad crossing sign, and is a public and much used crossing. Throughout the years it was much used on Sunday afternoons by the relatives of the students driving in to see their sons. The intersection, as admitted in the answer, was visible to the trainmen for more than a mile to the eastward as they approached the same (Tr. 18-20). The train was also visible to persons in the situation of the decedents, while turning towards, driving towards and moving on the crossing. There was no obstruction to the vision of either party. State Highway 40 parallels the track to the south. The south rail of the track is 71½ feet from the north edge of the highway at the crossing. On December 11, 1927, the decedents left their home in

Topeka and drove west on Highway No. 40 to see their son at the college. The deceased were both familiar with the crossing. When they got opposite the college entrance the automobile turned to the north and traveled without changing speed, estimated at from 10 to 15 miles an hour, from the highway to and upon the railroad track. When the rear wheels of their automobile got on the south rail (Tr. 51) respondent's train struck the automobile and carried it a distance of 1,752 feet to the west (Tr. 51, 31). When the train stopped, the automobile was still on the cowcatcher and Mr. Andlauer was dead and Mrs. Andlauer so injured that she almost instantly died. Resonent's train was a regular passenger train from Kansas City. It was nearly two hours late (Tr. 51). It passed the college grounds at a speed estimated by witnesses of from 55 to 60 miles per hour. The evidence showed that at said speed it could be stopped within 1,000 feet (Tr. 54). No whistle was blown or other warning given by the trainmen. A Kansas statute required respondent's trainmen to blow the whistle 80 rods east of the crossing. The statute made the failure to blow the whistle a crime. The city limit of St. Marys was 85 feet west of the crossing (Laws of Kansas 1925, p. 275). An ordinance prohibited the operation of trains in excess of twenty miles per hour (Tr. 56). A custom had theretofore been observed by respondent's trains when passing the college grounds to slow down to from twenty-five to thirty miles an hour (Tr. 51). The wrongdoing on the part of the respondent charged in the amended petition and established by the evidence is here reproduced:

> "—that defendant was negligent in that it operated its said train in a westwardly direction past the said college through said thickly populated and traveled vicinity and over the said intersecting northbound

public road at a high, dangerous and excessive rate of speed; that the said defendant was negligent in that it failed to sound any warning of the approach of the said train, notwithstanding the said defendant knew, and by the exercise of ordinary care could have known, and had notice and knowledge, that the said automobile in which the said deceased was riding and the said deceased was approaching and in a position of peril while turning towards and moving towards and moving on the said track, in time, by the exercise of ordinary care, in the use of the means at the command of the said defendant, to have avoided the collision and injury to the deceased, either by giving warning of the approach of the said railroad train or by slackening the speed thereof, or by stopping the said train, but that the said defendant negligently neglected so to do; that the defendant was also negligent in that contrary to a custom theretofore observed by it to slow down its trains when passing the said college and entering the said city of St. Marys, the said defendant negligently omitted to observe and follow the said custom and proceeded as aforesaid at said high, dangerous and excessive rate of speed; that defendant was also negligent in that it failed to ring any bell or sound any whistle when within eighty (80) rods of the said crossing and while approaching the said crossing."

Respondent's answer omitted a general denial. It contained specific denials. It did not deny the allegation that the automobile and deceased therein were in peril while turning toward and driving toward and driving on the crossing. The answer attempted to deny knowledge of the peril, but was ineffective for that purpose as it failed to comply with the Missouri statute, Section 776, R. S. Mo. 1929, requiring the answer to generally or specifically deny each material allegation of the petition

controverted by the defendant; or any knowledge or information thereof sufficient to form a belief. The answer alleged contributory negligence of both decedents in that they were unconscious of the approach of the train.

Under the Missouri Supreme Court decisions applying said statute the answer admitted the alleged peril and the knowledge thereof by defendant's trainmen. Though the evidence established the alleged peril and knowledge thereof, it was unnecessary to show by the evidence what was admitted by the answer under the state decisions. The cause was called for trial in February, 1932. Petitioner offered evidence tending to prove the foregoing facts. At the conclusion of the evidence respondent prayed the court to dismiss the plaintiff's case, with prejudice. This motion was sustained and a judgment dismissing the cause with prejudice was entered of record, all without petitioner's consent. The fact issues raised by the pleading were determined by the trial judge and were not submitted to the jury, either by peremptory instruction or otherwise. From this judgment petitioner appealed to the Circuit Court of Appeals for the Eighth Circuit. That court filed its opinion on February 17th, 1933 (Tr. 62-69) and on February 20, 1933, rendered its judgment of affirmance (Tr. 69-70).

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

I.

The Seventh Amendment commanding that "In suits at common law where the matter in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved" was ignored by the Court of Appeals in affirming the act of the trial judge in dismissing plaintiff's case at the close of the evidence, contrary to the decisions of this court in *Slocum* v. *New York Life Insurance Company*, 228 U. S. 364, and cited cases, and contrary to the decision of the Circuit Court of Appeals for the First Circuit in the case of *Langnes* v. *Gorton Pew Vessels Co.*, 59 Fed. (2d) 315.

II.

The Court of Appeals determined that plaintiff was not entitled to recover on either count, notwithstanding the failure to slow down while passing the college grounds to twenty-five or thirty miles per hour, in accordance with the custom, and notwithstanding the fact that decedents proceeded over the crossing on the assumption that the custom would be observed. Had it been observed the automobile would have been 80 feet north of the track when the train reached the crossing. The failure of the court below to give effect to the custom to relieve deceased from the imputation of contributory negligence as a matter of law conflicts with the law as declared in *Farrell* v. *Ry.*, 138 Fed. 28 (C. C. A. 2) and with the general law on the question as stated in Sec. 1669, Thompson on

Negligence, and same section in both of White's Supplements to said work.

III.

The Court of Appeals determined that deceased were guilty of contributory negligence as a matter of law, notwithstanding respondent's trainmen failed to comply with the custom and the statute requiring a whistle to be blown and notwithstanding the almost direct approach of the train prevented the deceased from knowing of the extraordinary and reckless speed and notwithstanding a warning whistle would have advised deceased of the fast approach and caused the automobile to stop before the collision. Before the court could hold Marcus Andlauer guilty of contributory negligence as a matter of law it would have to find that he knew of the unusual speed at which the train approached. Before it could hold Ellanore Andlauer likewise guilty it must find she had like knowledge and also that her experienced husband was not exercising due watchfulness and care. The decision conflicts with the general law on the subject.

IV.

The decision holding Ellanore Andlauer guilty of contributory negligence as a matter of law conflicts with the decisions of the Circuit Court of Appeals for the Ninth Circuit, in the following cases:

Southern Pac. Ry. Co., 248 Fed. 261;
Trenholm v. *Ry. Co.*, 8 Fed. (2d) 452;
Southern Pac. Ry. Co. v. *Stephens*, 24 Fed. (2d) 182.

The decision on said point also conflicts with the decision of the Court of Appeals for the Seventh Circuit in *Ry.* v. *Divine*, 39 Fed. (2d) 537.

The Court of Appeals for the Ninth Circuit in *Trenholm* v. *Ry.*, 8 Fed. (2d) 452, expressly holds that the decision by the 8th Circuit in *Bradley* v. *Ry.*, 288 Fed. 484, followed and applied herein conflicts with the rule on the same question applied in the Ninth Circuit and with "the weight of authority."

V.

The decision of the court below that the trainmen could assume that the automobile would stop before going on the track was conditioned upon the giving of a warning of the unusually fast approach of the train and the opinion below on said point conflicts with those of this court in *Continental Ry. Co.* v. *Stead*, 95 U. S. 161, and *Texas & Pacific Ry. Co.* v. *Cody*, 166 U. S. 660, holding that the train "is bound to give due warning of its approach so that the wagon may stop and allow it to pass." The assumption that the train was coming at the usual rate of speed lulled the deceased into feeing that they could safely cross and made the warning imperative.

VI.

The Court of Appeals failed to hold that the respondent's trainmen in driving over the much used public crossing at the excessive rate of 55 or 60 or 90 miles per hour at an unusual time, contrary to the custom to slow down to 25 or 30 miles per hour while passing the college grounds, and into the city of St. Mary's in viola-

tion of its ordinance limiting the speed to 20 miles per hour, and committing a crime by violating the statute requiring the warning for the crossing and without any warning, exhibited such gross disregard for the rights of others and the public generally as to warrant an inference of wanton negligence or conscious indifference to consequences so as to deprive the respondent of the defense of alleged contributory negligence and this contrary to the general law on the question as stated in Secs. 20, 22, Thompson on Negligence, and wealth of cases in *Breme* v. *Ry. Co.*, 318 Ill. 1, l. c. 17.

VII.

The statement of the last chance rule by the court below is in conflict with that of this and every other court on the question with reference to travelers in peril approaching and on highway crossings. That statement is (Tr. 67):

> "* * * the doctrine of discovered peril or last clear-chance is not applicable because there is no proof that the employees operating the train had knowledge of the peril. This court has consistently held that such knowledge *must be actual.* It is bottomed on the theory that after the actual discovery of a person in peril, there is time in which by the exercise of ordinary care, to avoid the injury. In the instant case, there is no evidence that the employees actually discovered decedent's peril.
>
> * * * * * *
>
> The exception (last chance doctrine) is limited to cases in which the defendant actually discovers the person injured and his peril in time to avoid the injury. *It does not include cases where, by the exercise of ordinary care, the plaintiff might have made such discovery in time to avoid the injury.*"

This statement of the rule conflicts with the statement thereof in *Ellzey* v. *Kansas City Southern Ry. Co.*, 275 U. S. 236, and in *Porto Rico L. & P. Co.* v. *Miranda*, 62 Fed. (2d) 479 (C. C. A. 1), stating the doctrine under the authority of this court in the Ellzey case (which it cites) thus:

> "* * * the last clear chance doctrine applies, although the defendant may not have seen and known of the dangerous situation of the plaintiff, if circumstances existed from which he should have anticipated the presence of plaintiff at the place of the accident and in the exercise of reasonable care could have seasonably avoided an accident."

The statement of the rule below also conflicts with that in *Tutwiler* v. *Lowery*, 279 Fed. 479 (C. C. A. 6), where the court decides that this court had never held that actual knowledge of the peril was necessary. It also conflicts with *Robinson* v. *Ry. Co.*, 112 Fed. 484 (C. C. A. 6), the late Justices Lurton and Day sitting; *Texas & P. Ry.* v. *Nolan*, 62 Fed. (C. C. A. 5), where the court held that the first statement of the doctrine in *Davies* v. *Mann*, 10 Mees & W. 456, was in conflict with that below, to-wit: that the doctrine applied because:

> "The servant of defendant either saw animal *or could have seen him in time to have avoided the injury if he had moderated his pace to a careful one.*"

It is also in conflict with *Railway* v. *Klutt*, 148 Fed. 818 (C. C. A. 6), certiorari denied, 204 U. S. 672.

It is also in conflict with the statement in a highway crossing case by the late Chief Justice Taft in 85 Fed. 413 (C. C. A. 6), Justice Lurton concurring.

It also conflicts with the now leading decision on the question in the British Empire. See *British Columbia Electric Ry. Co.* v. *Loach*, (1916) A. C. 719; 10 British Ruling Cases 882, and with the opinions of the late Chief Justice Anglin, of Canada, in *Columbia Bithulithic Company* v. *British Columbia Electric Co.*, 55 Canada Supreme Court 1, and *Brenner* v. *Toronto Ry. Co.*, 43 Ont. L. Rep. 423.

VIII.

The statement by the court below that:

> "In the instant case, the Railroad Company produced no testimony and there was no evidence that the engineer or fireman, or any other employees in charge of the train discovered the Andlauers or their peril before they were injured, and hence the exception to the rule of contributory negligence cannot be invoked"

is, in effect, a decision formulating a new rule upon an important question of law, to-wit: That unless the perpetrator of a wrong admits it, it cannot be proven by facts and circumstances. This is contrary to the general rule on the question, and to the rule in the state where the cause was tried made applicable by the Conformity Act. (*Lynch* v. *Railroad*, 208 Mo., l. c. 21, also l. c. 24.) There it is said:

"Knowledge, like actual notice, may be proved by direct evidence, or it may be inferred from facts and circumstances." There the court held that the fact that the track was unobstructed for two-thirds of a mile, on a clear day, authorized the jury to infer actual knowledge of the peril on the part of the trainmen. The jury herein could infer that the trainmen actually saw the automobile and the peril from the fact that there was no ob-

struction, the day was clear, and no change in the speed of the automobile. (*Chapman* v. *Ry.*, 217 Mo. App. 312, Syll. 5.) The jury could infer that one blast of the whistle would have stopped the automobile and saved deceased.

> "It is not always necessary to show the train could have been *stopped* by those in charge by the exercise of ordinary care in order to invoke the humanitarian (or last chance) doctrine a failure to stop, slow down or *warn* by bell or whistle may be sufficient to invoke the doctrine. (*Chapman* v. *Ry.*, 217 M. A., l. c. 324.)"

The ruling of the court on this question is in conflict with the law everywhere.

The ruling of the court below as to whether the trainmen had actual knowledge under the evidence conflicts with the opinion of this court in *Grand Trunk Railway Company* v. *Ives*, 144 U. S. 408, holding that

> "When a given state of facts is such that reasonable men may fairly differ upon the question as to whether there was negligence or not, the determination of the matter is for the jury. It is only when the facts are such that all reasonable men must draw the same conclusion from them that the question of negligence is ever considered as one of law for the court."

IX.

Under the construction given to the statute giving this court jurisdiction on certiorari to review decisions of the Circuit Courts of Appeals, as stated by Justice Brewer in *Forsyth* v. *Hammond*, 166 U. S. 506, to-wit:

> "Nine separate appellate tribunals might by their difference of opinion, unless held in check by the reviewing power of this court create an unfortunate confusion in respect to the rules of Federal decision."

And as stated by Chief Justice Taft in *Magnum* v. *Coty*, 262 U. S. 159, it is said:

> "The jurisdiction to bring up cases by certiorari from the Circuit Courts of Appeals was given for two purposes, first to secure uniformity of decision between those courts in the nine circuits, and second, to bring up cases involving questions of importance which it is in the public interest to have decided by this court of last resort."

And as stated in Rule 38 of this court, this is a case peculiarly calling for the exercise of the discretion vested in this court by the statute to issue the writ prayed for. A resume of the reasons is:

1. Conflict between the opinion below and that of this court on an important question, to-wit: whether the command of the Seventh Amendment shall be longer observed by the Federal Courts.

2. Conflict between the opinion below and that of another circuit and the general law on an important question, to-wit: whether an error of judgment caused by a defendant's negligence can be disposed of as a question of contributory negligence as a matter of law.

3. Conflict between the opinion below and those of other circuits on an important question, to-wit: whether a wife riding with her competent husband must take control of the driver and act on the assumption that he is neglecting his duty without any knowledge on her part that he is not.

4. Conflict between the opinion below and that of this court, the courts of the other circuits, and the English and Canadian courts on an important question, to-wit: whether the last chance doctrine applies at highway crossing much used by the public in populous vicinities and

not in the open country and where trainmen have no right to expect a clear track but must anticipate the presence of the public unless the evidence shows actual knowledge of the presence and peril of an injured person in time to save him or whether negligent failure to discover the presence and peril is sufficient to establish liability.

Wherefore, your petitioner prays that a writ of certiorari under the seal of this court directed to the United States Circuit Court of Appeals for the 8th Judicial Circuit commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of the said United States Circuit Court of Appeals for the 8th Circuit and of the case numbered and entitled on its docket No. 9554, At Law, *William Miller, Administrator of the Estates of Marcus Andlauer and Ellanore Andlauer, Deceased, Appellant,* v. *Union Pacific Railroad Company, a corporation, Appellee,* to the end that cause may be reviewed and determined by this court as provided for by the statutes of the United States and that the judgment of the United States Circuit Court of Appeals for the 8th Circuit be reversed by this court, and for such further relief as to this court may seem proper.

Dated May 4, 1933.

WILLIAM MILLER, *Administrator of the estates of Marcus Andlauer and Ellanore Andlauer, deceased, Petitioner,*

By WILLIAM BUCHHOLZ,
MARTIN J. O'DONNELL,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of Court Below.

The opinion of the United States Circuit Court of Appeals for the 8th Circuit is reported in 63 Fed. (2d) 574, and at pages 62 to 69 of the record.

II.

Jurisdiction.

1. The date of the judgment to be reviewed is February 20, 1933. A petition for a rehearing was filed in accordance with the rule of said Circuit Court of Appeals and denied on the 24th day of March, 1933.

2. The statutory provision which is believed to sustain the jurisdiction of this court is the following: Sec. 347, 28 U. S. C. A., providing:

> "—in any case, civil or criminal, in a Circuit Court of Appeals * * * it shall be competent for the Supreme Court of the United States upon the petition of any party thereto, whether government or other litigant, to require by certiorari, either before or after a judgment or decree of such lower court that the cause be certified to the Supreme Court for determination by it with the same power and authority and with like effect as if the cause had been brought there by unrestricted writ of error or appeal." (Which said statute in its present form was adopted February 13, 1925, 43 Stat. 938.)

III.

Statement of the Case.

This has already been stated in the preceding petition in I (page 15). It is hereby adopted and made a part of this brief.

IV.

Specification of Errors.

1. The court erred in holding that the judge of the trial court, without the consent of petitioner, at the close of all the evidence, committed no error in rendering a judgment dismissing plaintiff's case, and in holding that the objection to the judgment as to such act was purely technical, and that petitioner's right to a trial by jury was not a matter of substance, but a matter of form.

2. The court erred in holding that petitioner had no right to recover on Count I of the petition.

3. The court erred in holding that petitioner had no right to recover on Count II of the petition.

4. The court erred in holding that Ellanore Andlauer was guilty of contributory negligence, as a matter of law.

5. The court erred in holding that Marcus Andlauer was guilty of contributory negligence, as a matter of law.

6. The court erred in holding that the petitioner could not recover on either count, under the rule of law known as the last chance rule.

7. The court erred in holding that the petitioner could not recover under the last chance doctrine (where the

trainmen had no right to expect a clear track) unless there was evidence showing actual knowledge on the part of the trainmen of the position of peril of the deceased.

8. The court erred in holding that there was no evidence in the record from which the jury could infer that the trainmen had actual knowledge of the peril of the deceased.

9. The court erred in holding that the conduct of the trainmen exhibited such conscious indifference to the rights of the public as to deprive respondent of the defense of contributory negligence.

ARGUMENT.

The reasons given in the petition for the writ, pages 6-13, together with those set forth in the motion for a rehearing (Tr. 71-82), so plainly state the position of the petitioner and show his right to have the writ prayed for issued that he waives argument.

Conclusion.

It is therefore respectfully submitted that this case is one calling for the exercise by this court of its supervisory powers, in order that justice be done herein and that the conflicts on the important questions herein involved be corrected and that to such end a writ of certiorari should be granted and this court should review the decision of the United States Circuit Court of Appeals for the Eighth Judicial Circuit and finally reverse it.

Respectfully submitted,

WILLIAM BUCHHOLZ and
MARTIN J. O'DONNELL,
Attorneys for Petitioner.